IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 14.

EUGENE DENNIS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

BRIEF OF THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

NATIONAL LAWYERS GUILD,
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Statement.

The National Lawyers Guild is a national association of members of the bar, having chapters throughout the United States. As a bar association, this organization has, at all times, been intimately concerned with the proper and fair administration of justice in courts throughout the land. As an association of lawyers, whose belief it is that attorneys bear a special responsibility to the people in the protection of their civil rights and liberties, the Guild has frequently participated in proceedings involving the serious constitutional questions which delimit the scope and area of the freedom guaranteed to the people by the Bill of Rights.

The single issue before the Court in this proceeding engages the attention of the Guild in both of these respects. It has, accordingly, secured the consents of the parties herein to the filing of this brief as amicus curiae.

The narrow question presented is whether government employees as a class, must, today, in the light of the special pressures which operate upon them, be excluded from a jury panel which must determine the guilt or innocence of a leader of the Communist Party of the United States of a charge initiated by the Government to vindicate its authority.

The effect of the determination of this question, however, will not rest here. The stake is not so small as one year in the life of this appellant. The lives and reputations of many persons, caught in the post-war whirlpool of fear and hysteria, hang on the decision of this Court. The survival of the jury in its historic function as the shield of the people against oppressive sovereigns, will also be decided here. The vindication of the hard-bought guarantee of the Sixth Amendment is at issue, as is the stature of the Courts of this country as the dispensers of even-handed justice, born of Constitutional prerogative, and bred on the American sense of fair play.

Fidelity to its responsibility and trust animates the appearance of the Guild as *amicus curiae;* its brief is submitted in this spirit and in the expectation that its views may aid the Court in reaching a proper determination, consonant with the best traditions of American democracy.

Argument.

The institution of the Jury "as the bulwark of the People against the tyrannical or unlawful exercise of authority" (Sir Richard Phillips, *Powers and Duties of Juries*, preface IV; Forsythe, *History of Trial by Jury* (2nd. ed.) 363), has long been recognized in Anglo-American jurisprudence, and highly esteemed and valued by the people as an agency for securing their freedoms. Blackstone, *Commentaries*, III, 350; May, *Constitutional History of England*, II, 114; Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 Harvard Law. Rev. 917.

Abrogation, in whole or in part, of the right to trial by an impartial jury of one's peers has been the seemingly inevitable accompaniment of the assumption, in every age, of autocratic power by rulers and governments. Tudor England resorted to the Court of Star Chamber. Its ultimate abolition was achieved on the ground that the "decrees of the Court have by experience been found to be an intolerable burden to the subjects, and the means to introduce an arbitrary power and government." 16 Chas. I, C. 10. In the Declaration of Independence, the colonists "submitted to a candid world" that a despotic king had deprived them of "the benefits of Trial by Jury." *See also*, Elliot's *Debates*, IV, 143. As a prelude to the sedition trial of James Callender, indicted under the ill-famed Alien and Sedition Laws of 1798, Supreme Court Justice Chase, riding the circuit, instructed the Marshall at Richmond, Virginia, "not to put any of those creatures called democrats on the jury."

In the midst of the bitter social conflicts of this day in American history, marked by severe political repression, the question of an impartial jury trial is again raised, in the classic historical setting of the struggle of the politically pilloried and persecuted against their persecutors and oppressors.

The standards by which the issue, today, must be determined are fixed in a matrix compounded of Constitutional Injunction and unbroken judicial precedent. The Sixth Amendment, which along with the other guarantees of the Bill of Rights, was extracted by a revolutionary people jealous of its freedom, provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." Court decisions, dating from the foundation of the Republic to the present day, reflect not only the letter of the Amendment, but the spirit of the American tradition of trial by an impartial jury drawn from a cross-section of the com-

munity. 1. *Burr's Trial* 464; *Glasser* v. *United States*, 315 U. S. 60; *Chambers* v. *Florida*, 309 U. S. 227, 336.

Even a suspicion of partiality or prejudice will disqualify a prospective juror from sitting on a panel. 1 *Burr's Trial* 464; *United States* v. *Chapman*, 158 F. (2d) 417 (C. C. A. 10th, 1946), *Cert. den.* 335 U. S. 860. In the latter case the Court commented (p. 460): "Only by a punctilious regard for a suspicion of prejudice can we hope to maintain the highest traditions of our jury system."

From the time the jury system reached its maturity in England, it has been recognized that certain relationships between parties and prospective jurors *per se* create a "suspicion of partiality." It was considered necessary that the triers of fact be "free and lawful, impartial and disinterested, neither the enemies nor the too close friends of either litigant." (Pollock and Maitland, *History of English Law*, II, 619). Lord Coke listed as the third of his four principal challenges to the polls, "*propter defectum*, for affection and partiality." (Coke, *on Littleton*, I, 156 (b)). Bacon considered good cause for principal challenge "if the juror be under the power of either party, as if counsel, servant of the robes, or tenant. (Bacon's *Abridgment*, III, 756). Bentham sought to protect jurors from influences which are "liable to be exercised by, or to emane from individuals or classes of men, in the character whether the parties or of persons having in any way an interest in the event of each respective cause." (Bentham, *The Elements of the Art of Packing*, Lord, (1821) 219). *See also:* Elliot's *Debates*, III, 542.

From this basic concept have developed rules of law which impute bias to classes of individuals without regard to whether or not an individual of that class is, in fact, biased or prejudiced, and membership in that class is, *per se*, held basis for disqualification. *Republic* v. *Richards*, 2 U. S. 224; *Miller* v. *United States*, 38 App. D. C. 361; *Young* v. *Marine Insurance Co.*, Fed. Cas. No. 18,163, 1 D. C. 452; *Anderson* v. *Todd*, 63 F. Supp. 229.

Under certain circumstances, government employees, although not under an absolute disqualification as such, may be excluded as a class. *United States* v. *Woods*, 299 U. S. 123. The *Woods* case affirmed the constitutionality of a statute removing the absolute disqualification upon civil servants to sit as jurors in criminal prosecutions, created by the decision in *Crawford* v. *United States*, 212 U. S. 183. It, however, writes into the law a recognition that in special situations, the relationship of government employed jurors to the prosecution may give rise to, at the very least, a suspicion of bias or partiality which must disqualify them as a class. The Court there said at p. 150:

> "It is suggested that an employee of the Government may be apprehensive of the termination of his employment in case he decides in favor of the accused in a criminal case. *Unless the suggestion be taken to have reference to some special and exceptional case* it seems to us far-fetched and chimerical." (Italics added.)

Such "exceptional cases", leave in force the rationale of the Court, in the *Crawford* case, as the standard for determining the impartiality of a government-employed juror:

> "It need not be assumed that any cessation of that employment would actually follow a verdict against the government. It is enough that it might possibly be the case; and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict."

In *Frazier* v. *United States*, 355 U. S. 497, the majority reiterated this view that actual bias in relation to government-employed jurors includes "not only prejudice in the subjective sense but also such as might be thought implicitly to arise 'in view of the nature or circumstances of his employment, or of the relation of the particular govern-

mental activity to the matters involved in the prosecution or otherwise.'"

It is submitted that such exceptional circumstances exist here as to bring into operation the exlusionary tests of the *Woods*, *Crawford* and *Frazier* cases.

This case was brought against a leading member of the Communist Party of the United States by the Government of the United States, on the information of the House Committee on Un-American Activities, an organ of the House of Representatives of the United States, on a charge of contempt of that body. The jurors were impanelled and sat in the District of Columbia, in an atmosphere created by years of concentrated effort to create the impression that the Communist Party was "subversive", and "Un-American"; that adherents to its ideas were similarly "subversive" and "Un-American"; that anything in the nature of sympathetic audience to its views, or what were ascribed as its views were, equally, not to be tolerated by "patriotic" Americans. (Cushman, R. E., Safeguarding Civil Liberty Today, N.Y. 1945.) The leading spirit of this effort had, for a decade, been the House Committee on Un-American Activities.

In addition to the psychological pressures to compel conformity to the "orthodox", the Committee, at all times, exercised the power and prestige of government to coerce adherence to its views. The means adopted by it have ranged from exposure to public obloquy (*see e. g.* H. R. Rep. No. 1, 77th Cong., 1st Sess. (1941) 23, 24) to Bills of Attainder (*see*, United States v. Lovett, 328 U. S. 303). One of its prime efforts was to embody its entire program of political repression into law. (*see*, Mundt-Nixon Bill, H. R. 1844, 80th Cong., 2d Sess.)

The effect of the activities of this infamous Committee has resulted in "A state of near-hysteria (which) now threatens to inhibit the freedom of genuine democrats." (Report, President's Committee on Civil Rights: "To Secure these Rights", 1947, 49; Lerner, M., "Freedom:

Imagine and Reality"; Safeguarding Civil Liberties Today, 1945; Clark, J., dissenting in *United States* v. *Josephson*, 165 F. (2d) 82, 100 (C. C. A. 2nd 1947), cert. den. 68 S. Ct. 609; Edgerton, J., dissenting in *Barsky* v. *United States*, 167 F. (2) 241 (App. D. C., 1947) *cert. den.* 68 S. Ct. 155, *pet. for rehearing pending.*

Executive Order 9835 (12 Fed. Reg. 1947) applied the policies of this Committee specifically to government employees. For, among other things, "sympathetic association with any . . . communist", under this so-called "loyalty" program, a government employee might be discharged from his job, and stigmatized as "disloyal" to the government of the United States. The character of the investigation, the amorphousness of the criteria for judging "sympathetic association" or "disloyalty" must compel government employees to avoid even the appearance or suspicion of such activity. 58 Yale Law Journal 1; Physics Today, Vol. 2, No. 3 (1949); O'Brian, "Loyalty Tests and Guilt by Association," 61 Harvard Law Rev. 592. Case after case of dismissal and "voluntary" resignation has brought this fact home to each government employee. (*See e. g.* P. M. April 19, 1948, 7; the case of Dr. Edward U. Condon; Herald Tribune, Dec. 21, 25, 1948; the case of Laurence Duggan; P.M., August 18, 1948; the case of Harry Dexter White; Andrews, Washington Witch Hunt, N.Y. 1948, 1-77; the case of the seven State Department employees.)

It would not be without reason, therefore, if a government employee should be swayed by considerations of self-interest, conscious or subconscious, in the reaching of a verdict concerning a leader of the Communist party, when faced with the possibility of such a charge of "sympathetic association". *See*, Edgerton, J. dissenting in *Eisler* v. *United States*, decided April 18, 1949,:

> "Government employment alone does not disqualify a juror in a prosecution for larceny, United States v. Wood, 299 U. S. 123, or violation of the narcotics laws.

> Frazier v. United States, 355 U. S. 497. But government employment is not commonly known to be endangered by sympathetic association with thieves or drug peddlers. It is commonly known to be endangered by sympathetic association with Communists. Government employees are therefore anxious, in various degrees, according to their temper and circumstances, to avoid seeming to sympathize with Communists. Acquittal sometimes indicates, and is often thought to indicate, that the jury sympathized with the accused. It is therefore prudent for government employees to convict an alleged Communist and imprudent to acquit him. For government employees to acquit this alleged Communist leader would have been particularly imprudent."

Judge Edgerton's conclusion as to the law of that case, under the law and the facts of the instant case would seem to be the proper guide for the decision of the subject action. "Trial by jurors whose personal security will either actually or apparently be promoted by conviction and endangered by acquittal is not 'trial by an impartial jury' and is not due process of law."

The petitioners challenge to government employees in this proceeding should have been sustained.

Conclusion.

THE NATIONAL LAWYERS GUILD submits that this Court should reverse the judgment of conviction.

Respectfully submitted,

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